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6 UNITED STATES BANKRUPTCY COURT  
7 EASTERN DISTRICT OF WASHINGTON  
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9 In Re:

10 EMERALD OUTDOOR ADVERTISING,  
11 L.L.C.,

12 Debtor(s).

)  
) No. 03-03851-W11  
)  
)

11 MEMORANDUM DECISION RE:  
12 HARRISON'S MOTION FOR RELIEF  
13 FROM STAY AND EMERALD'S MOTION  
TO ASSUME EXECUTORY CONTRACTS  
AND LEASES

14 PATRICIA C. WILLIAMS, Chief Bankruptcy Judge:

15 This dispute involves the competing interests of a leaseholder and  
16 a lienholder in Indian trust land. The lienholder maintains that its  
17 non-judicial foreclosure under state law terminated the lessee's  
18 interest. The debtor, who holds the lessee's interest, maintains that  
19 due to defects in the recording and processing of title documents, the  
20 lienholder's interests were inferior to those of the debtor and the  
21 foreclosure had no effect on the debtor's interests in the property.

22 The specific matters before the court are the debtor's request to  
23 assume the leases and a request by the lienholder to lift the automatic  
24 stay. Resolution of these specific matters and the underlying dispute  
25 between the parties involves the interplay of federal and state statutes  
26 in the context of a foreclosure of an interest in Indian trust land. A  
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28 MEMORANDUM DECISION RE: . . . - 1

**FILED**

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U.S. BANKRUPTCY COURT  
EASTERN DISTRICT OF WASHINGTON

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1 simplified chart with a chronology of the events is attached to this  
2 opinion.

3 **FACTUAL HISTORY OF THE DISPUTE**

4 On June 13, 1994, Roleen Williams Hargrove (hereinafter  
5 "Hargrove"), an enrolled member of the Puyallup Tribe of Indians,  
6 granted a Deed of Trust to Business Finance Corporation (hereinafter  
7 "BFC"). In 1994, that Deed of Trust, which concerned Indian trust land,  
8 was recorded in Pierce County, Washington, the location of the Indian  
9 trust land. The Bureau of Indian Affairs (hereinafter "BIA") generally  
10 administers and regulates Indian affairs, including Indian trust land.  
11 The Deed of Trust was not recorded with the BIA until 1997. The BIA  
12 issued a certificate approving the Hargrove Deed of Trust to BFC in  
13 1994, although the effect of that certificate is in dispute.

14 In 1995, Hargrove entered into two leases with Emerald Outdoor  
15 Advertising, L.L.C. (hereinafter "Emerald"). These leases granted  
16 Emerald the right to construct and maintain three billboards upon  
17 portions of the real property which was subject to the Deed of Trust.  
18 Promptly after execution of the leases, Emerald recorded the leases with  
19 the BIA and obtained its approval of the leases. It did not record them  
20 with Pierce County.

21 BFC assigned its beneficial interest under the Deed of Trust to  
22 Gold Eagle Gaming, L.L.C. (hereinafter "Gold Eagle") and to John Soh on  
23 January 2, 1996. That assignment was promptly recorded in Pierce  
24 County. Four months later, the assignment was also recorded with BIA.  
25 At the end of 1997, John Soh assigned his one-half beneficial interest  
26 under the Deed of Trust to Gold Eagle. That assignment was recorded  
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1 with BIA and Pierce County. In March of 1998, Gold Eagle commenced a  
2 non-judicial foreclosure proceeding against Hargrove who attempted to  
3 prevent foreclosure by bringing an action in the Puyallup Tribal Court.  
4 The Tribal Court ruled favorably for Gold Eagle, but prior to the  
5 foreclosure sale, Gold Eagle assigned its beneficial interest under the  
6 Deed of Trust to Tiffany J. Harrison (hereinafter "Harrison"), an  
7 enrolled member of the Puyallup Tribe of Indians. That assignment  
8 occurred on February 8, 2001 and was recorded with Pierce County, but  
9 neither recorded with nor approved by BIA. The day following the  
10 assignment, Hargrove commenced a Chapter 11 reorganization bankruptcy in  
11 the Western District of Washington. Ultimately, a plan was confirmed  
12 and the Bankruptcy Court allowed the Deed of Trust to be foreclosed.  
13 The foreclosure sale occurred May 31, 2002 with the Trustee's Deed  
14 issued to Harrison as successful bidder being recorded on June 7, 2002.  
15 The Trustee's Deed was recorded with both the BIA and Pierce County.  
16 Tribal Court actions between Harrison and Emerald followed.

17 **PROCEDURAL HISTORY OF THE CASE**

18 On August 9, 2002, Harrison, as successful bidder at the  
19 foreclosure sale and owner of the property, filed a suit against Emerald  
20 in the Puyallup Tribal Court seeking to evict Emerald from the real  
21 property it had leased and upon which it had constructed billboards.  
22 The Tribal Court dismissed this first action without prejudice on  
23 procedural grounds on November 6, 2002. On December 16, 2002, Harrison  
24 commenced a quiet title action in the Puyallup Tribal Court which sought  
25 ejectment of Emerald, damages and declaratory relief.

26 During the course of that second action, on May 5, 2003, Emerald  
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1 commenced a Chapter 11 reorganization proceeding in the Eastern District  
2 of Washington. The same day, Emerald filed a motion to assume certain  
3 executory contracts which motion included the leases which were the  
4 subject of the Tribal Court action and continue to be the source of the  
5 dispute between Emerald and Harrison. In addition to objecting to the  
6 assumption, Harrison also filed a motion to lift the automatic stay in  
7 order to continue with the second Tribal Court action.

8 Pursuant to the parties' agreement, on June 24, 2003, the Tribal  
9 Court action was removed to the United States District Court for the  
10 Western District of Washington. After a hearing on the issue of the  
11 federal District Court's jurisdiction, that court determined that  
12 jurisdiction existed in the Bankruptcy Court for the Eastern District of  
13 Washington under 28 U.S.C. §§ 157, 1334 and 1412. The case was then  
14 transferred from the United States District Court for the Western  
15 District of Washington to the United States District Court of the  
16 Eastern District of Washington which, on August 5, 2003, referred the  
17 matter to this Bankruptcy Court.

18 At the preliminary hearing on the motion to assume leases and lift  
19 the automatic stay, the parties agreed that all factual and legal issues  
20 in those motions are identical to the now pending adversary proceeding  
21 which had been initiated in Tribal Court and ultimately referred to this  
22 court.

### 23 LEGAL ISSUES

24 1. As the recording of the 1994 Deed of Trust did not occur with  
25 the BIA until 1997, was the BIA's 1994 approval of the Deed of Trust  
26 effective?

1        2. Which was the proper place of recording, the BIA or Pierce  
2 County? As argued by Harrison, the 1994 recording of the Hargrove to  
3 BFS Deed of Trust in Pierce County resulted in that Deed of Trust  
4 becoming a first priority lien on the trust land. As argued by Emerald,  
5 the 1995 recording with BIA of the leases from Hargrove to Emerald  
6 resulted in those leases becoming a first priority encumbrance on the  
7 trust land.

8        3. As no BIA approval was obtained of the assignment of Gold  
9 Eagle's beneficial interest under the Deed of Trust to Harrison, was  
10 that assignment valid?

11        4. Did confirmation of the Hargrove bankruptcy reorganization plan  
12 preclude re-litigation of these issues?

13        5. Assuming Harrison properly held the beneficial interest under  
14 the Deed of Trust at the time of foreclosure, did the state foreclosure  
15 process extinguish Emerald's leasehold interest?

16                **ISSUE 1 - DISTINCTION BETWEEN APPROVAL AND RECORDING**

17        On July 7, 1994, the Puget Sound Agency of the BIA issued a  
18 Certificate of Approval of the Hargrove to BFC Deed of Trust. BIA did  
19 not record the Deed of Trust in its recording system. In 1997 when Gold  
20 Eagle, which then held the lien, attempted to record the Deed of Trust  
21 with the Portland Area Agency of BIA, personnel at that agency opined  
22 that the failure to record the Deed of Trust rendered the 1994 approval  
23 invalid or ineffective until the date of the recording of the Deed of  
24 Trust. Emerald now argues that both the approval and recording of a  
25 Deed of Trust on Indian Trust land must take place in order to render  
26 the Deed of Trust enforceable.

1 Federal courts give deference to an agency's interpretation of its  
2 own regulations. *Department of Health & Human Services v. Chater*, 163  
3 F.3d 1129 (9<sup>th</sup> Cir. 1998). This assumes, however, that the  
4 interpretation is in the form of a formal or official pronouncement of  
5 the agency. That is not the situation here. The only evidence  
6 submitted regarding the BIA's interpretation of its regulations is a  
7 letter from and notes of conversations with personnel at one office of  
8 the agency opining upon acts taken by another office of the same agency.  
9 There is no indication those personnel had any authority to speak for  
10 the BIA. Nor are the correspondence or verbal communications official  
11 pronouncements.

12 Whether recording is a prerequisite to approval of a transaction  
13 regarding Indian trust land requires statutory interpretation.  
14 25 U.S.C. § 483(a) provides that individual owners of Indian trust lands  
15 such as Hargrove may execute a Deed of Trust and encumber the trust land  
16 " . . . subject to approval by the Secretary of the Interior" which  
17 authority has been delegated to BIA. 25 C.F.R. § 152.22 states that an  
18 Indian may not convey an interest in trust land without approval of the  
19 BIA. The BIA has discretion whether to approve a transaction and may  
20 exercise its discretion based upon its investigation and opinion of the  
21 substance of the transaction. *Oglala Sioux Tribe v. Hallet*, 708 F.2d  
22 326 (8<sup>th</sup> Cir. 1983). Any conveyance by an Indian owner of an interest  
23 in trust land made without approval of the BIA is void. *Black Hills*  
24 *Institute of Geological Research v. South Dakota School of Mines and*  
25 *Technology*, 12 F.3rd 737 (8<sup>th</sup> Cir. 1993).

26 The BIA is empowered to maintain a recording system reflecting  
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1 ownership of Indian trust land. 25 U.S.C. § 5. Recording is the  
2 acceptance of a title document by the appropriate land title office of  
3 BIA which is charged with responsibility to maintain records of  
4 ownership. 25 C.F.R. § 150.3. The regulations contemplate recording  
5 immediately after approval of the title transfer. "All title documents  
6 shall be submitted to the appropriate Land Titles and Records Office for  
7 recording immediately after final approval, issuance, or acceptance."  
8 25 C.F.R. § 150.6.

9 The statutes and regulations do not condition validity of the  
10 conveyance of trust land upon recording of the conveyance document.  
11 Approval of the conveyance requires an exercise of discretion by the  
12 BIA, recording is a ministerial act. Recording is not a pre-requisite  
13 to either the decision to approve or the effectiveness of the approval.  
14 Failure to obtain approval results in certain consequences, i.e., the  
15 invalidity of the conveyance. Failure to record the transaction results  
16 in other consequences addressed in this opinion, but does not invalidate  
17 or delay the validity of the transaction. The Hargrove Deed of Trust  
18 was effective when approval was obtained in 1994 and the failure to  
19 record that Deed of Trust with BIA did not delay its effective date.

20 ISSUE 2 - WHAT IS THE PROPER PLACE OF  
21 RECORDING - BIA OR PIERCE COUNTY?

22 The Deed of Trust was recorded in Pierce County in 1994. The  
23 leases were recorded with the BIA in 1995. The primary legal issue is  
24 whether the priority between the competing interests under the Deed of  
25 Trust and the leases are to be established by the date of recording with  
26 BIA or by the date of recording with Pierce County.

1       The statutory and regulatory scheme established by Congress  
2 authorizes the BIA to maintain a recording system reflecting the  
3 transfers of interest in Indian trust land. The BIA also prepares and  
4 provides to interested persons title status reports and tract maps.  
5 Title documents are given consecutive numbers as they are recorded,  
6 although, unlike many state recording systems, they are not stamped with  
7 the date of recording. The recording with BIA provides ". . .  
8 constructive notice of the ownership and change of ownership and the  
9 existence of encumbrances to the land." 25 C.F.R. § 150.2. Emerald  
10 recorded its leases with the BIA in 1995 and that recording provided  
11 constructive notice to any third-party of the existence of the leases  
12 between Emerald and Hargrove.

13       Washington's recording scheme relating to real property interests  
14 provides that deeds, mortgages and other transfers of interest in land  
15 may be recorded with the County Auditor in which the land is located.  
16 The recording of a transfer constitutes constructive notice to third-  
17 parties of a transfer of ownership or existence of an encumbrance or  
18 other transaction which effects an interest in land. *Strong v. Clark*,  
19 56 Wash. 2d 230, 352 P.2d 183 (1960). The purpose of the constructive  
20 notice in the state system is to protect bona fide purchasers or  
21 lienholders, not the owner of the land. *Kim v. Lee*, 145 Wash. 2d 79, 31  
22 P.3d 665 (2001).

23       The state and BIA recording systems both provide constructive  
24 notice to third-parties of the transfer of an interest in land. Nothing  
25 in the federal statutes or regulations establish or identify any legal  
26 rights arising from the constructive notice. In order to determine the  
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1 effect on the rights of third-parties arising from the constructive  
2 notice, one must look to the substantive law. In this particular case,  
3 the question at issue is the priority of competing interests in Indian  
4 trust land. There is no federal law regarding priority of such  
5 interests. Neither 25 U.S.C. § 483 nor the regulations address the  
6 ranking of competing interests.

7 The Puyallup Indian Tribe undoubtedly has the authority to enact  
8 tribal ordinances which would establish priorities among competing  
9 interests in trust land but it has not done so. The tribe could base  
10 priority upon the recording date with the BIA with the earliest recorded  
11 interest having priority. The tribe could base priority upon some other  
12 basis. As the tribe has adopted no substantive law regarding priority  
13 of competing interests in land and the federal law provides none, state  
14 law controls.<sup>1</sup>

15 The conclusion that substantive state law controls this priority  
16 dispute results from the application of 25 U.S.C. § 483(a). That  
17 statute provides that if an Indian owner of trust land mortgages or  
18 encumbers it, that encumbrance may be foreclosed in accordance with  
19 Tribal law or if no Tribal law exists, in accordance with state law.  
20 The federal statute makes no distinction between the procedure of  
21 foreclose and the substantive law of foreclosure. In the absence of  
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23 <sup>1</sup>This conclusion is consistent with the actions of the Tribal  
24 Court. The Puyallup Tribal Court indicated in its appellate decision  
25 in *Hargrove v. Gold Eagle Gaming, LLC*, 98-561 (1999), that the Tribal  
Court, due to the absence of tribal law, would apply the substantive  
foreclosure law of Washington.

26 Also, the Deed of Trust itself refers to remedies upon default  
27 " . . . in accordance with the Deed of Trust Act of the State of  
Washington."

1 Tribal law, substantive state law controls.

2 The Washington statutory scheme generally renders a properly  
3 recorded deed or conveyance prior in right to any later recorded deed or  
4 conveyance. *Altabet v. Monroe Methodist Church*, 54 Wash. App. 695, 777  
5 P.2d 544 (1989). Conceptually, the state recording scheme establishes  
6 the premise that if notice of a particular transaction has been given,  
7 either actual or constructive, that transaction generally takes  
8 precedence over any later transaction.

9 Notice of an interest in land is distinguishable from the  
10 substantive law regarding the priority of interests in land. A  
11 determination of priority may under applicable statutes be determined by  
12 the date of notice, but that determination requires an examination of  
13 more than just the date of the notice itself. It is not the notice  
14 which gives rise to the status of a first and prior lien but the  
15 applicable substantive law. Priority is not solely dependent upon the  
16 earliest date of notice but may depend upon the type of transaction.  
17 For example, R.C.W. 60.04.061 establishes priority of mechanics liens by  
18 the date which materials were first supplied or labor provided not  
19 solely by the date of notice of the lien. R.C.W. 60.11.050 regarding  
20 crop liens subordinates certain earlier filed liens to later filed  
21 liens. The earliest recorded notice of a transfer of an interest in  
22 land does not invariably result in a priority for that transfer.

23 Recording with the Pierce County Auditor operates as constructive  
24 notice as does recording with the BIA. In situations involving Indian  
25 trust land located in Washington, this results in a duplicate method of  
26 providing constructive notice, either recording with the appropriate  
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1 county auditor or the BIA. The recording systems co-exist, but are not  
2 inconsistent. They provide two options to constructively notify third-  
3 parties that a transfer of an interest in trust land has occurred.  
4 Practically this means that the earliest date of recording, whether with  
5 the BIA or the county auditor, will operate as constructive notice to  
6 third-parties of the transfer. Prudent persons involved in transactions  
7 involving a transfer of an interest in Indian trust land may record in  
8 both systems, but the earliest recording will result in the earliest  
9 constructive notice. The effect of that notice in terms of priority of  
10 interest will be determined by state law.

11 The 1994 Deed of Trust was recorded in Pierce County in that year.  
12 That recording operated as constructive notice to the world of that  
13 transfer of an interest in Indian trust land. Under state law, that  
14 Deed of Trust has priority over later occurring transfers absent some  
15 countervailing statute granting priority to the later transfer due to  
16 the nature of the transfer. Emerald's 1995 recording with BIA of its  
17 leases was also constructive notice to the world of that transfer of an  
18 interest in land. Under state law, later transfers would be inferior to  
19 Emerald's interest absent some countervailing state statute granting  
20 priority to a later transfer due to the nature of the transfer.  
21 Simplistically, the earliest recording, whether with BIA or the county  
22 auditor, is the notice which determines the priority of the interest  
23 granted in the recorded document. As the Deed of Trust to BFC was  
24 recorded first, it receives priority.

25 **ISSUE 3 - MUST CONVEYANCES BY NON-INDIANS BE APPROVED?**

26 The February 8, 2001 assignment by Gold Eagle of its beneficial  
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1 interest under the Deed of Trust to Harrison was not approved by the  
2 BIA. Previous assignments of the beneficial interest under that Deed of  
3 Trust had been approved by the BIA. Emerald argues that the assignment  
4 to Harrison required approval under 25 U.S.C. § 483, and since no  
5 approval was given, the assignment was invalid. Consequently, Harrison  
6 had no right to foreclose the Deed of Trust in May of 2002, the  
7 foreclosure sale was invalid, and Emerald's leases remained in effect.

8 The question is whether the assignment of a beneficial interest  
9 held by a non-Indian under a Deed of Trust on trust land requires  
10 approval by the BIA. None of the relevant statutes specifically address  
11 a conveyance of an interest in trust land to an Indian. An Indian owner  
12 of trust land may convey his or her interest in trust land, but only  
13 upon approval of the BIA and absent approval, any such attempt to convey  
14 is invalid. *Black Hills Institute, supra*. The requirement for approval  
15 of conveyances by Indian owners was originally placed into the 1934  
16 Indian Regulatory Act due to the historical exploitation of Indians. As  
17 stated in *Black Hills, supra*, at page 744:

18 The current statutory scheme reflects Congress's desire to  
19 protect beneficial owners of Indian trust land like Williams  
20 regarding disposition of interests in such land. See 25  
21 U.S.C. §§ 348, 464, 483; see also *Tooahnippah v. Hickel*, 397  
22 U.S. 598, 609, 90 S.Ct. 1316, 1323, 25 L.3d.2d 600 (1970)  
23 (explaining that the GAA's legislative history 'reflects the  
24 concern of the Government to protect Indians from improvident  
25 acts or exploitation by others'). Congress may very well  
26 determine that the historic practice of shielding beneficial  
27 owners from their own improvident decisions, unscrupulous  
28 offerors, and whatever other evils the enacting Congresses  
contemplated decades ago is no longer wise. (Footnote  
omitted) Until it does, however, we are bound to apply the  
statutes and regulations forbidding such owners from  
alienating trust land without the Secretary's approval.

1 The regulations adopted at 25 C.F.R. § 152, et. seq., reflect the  
2 statute's paternalistic approach. 25 C.F.R. § 152.34 states that an  
3 individual Indian owner of trust land may, with approval, sign a Deed of  
4 Trust or mortgage. 25 C.F.R. § 5 requires the BIA maintain a copy of  
5 every deed executed "by" an Indian which deed must be approved. The  
6 requirement for approval is set forth in 25 U.S.C. § 483. That statute  
7 states the BIA is authorized ". . . to approve conveyances, with respect  
8 to lands or interests in lands held by individual Indians . . . ."

9 Clearly the statute requires approval of any transfer of an  
10 individual Indian owner's interest in land. Emerald's contention is  
11 that any transaction which involves land in which an individual Indian  
12 has an interest requires approval by BIA whether or not the Indian owner  
13 is a party to the transaction. The statutory phrase "held by individual  
14 Indians" modifies the term "lands or interests in lands" and governs  
15 interests held by Indians. It does not govern the transfer of an  
16 interest which is not held by an Indian. Emerald argues that ambiguity  
17 is created by the phrase "with respect to" the land. The assignment of  
18 a beneficial interest under a Deed of Trust is certainly a conveyance  
19 "with respect to" the land which is subject to the Deed of Trust.  
20 Washington law characterizes such beneficial interests as real property  
21 interests. *Washington State Dept. of Revenue v. Security Pacific Bank*  
22 *of Washington N.A.*, 109 Wash. App. 795, 38 P.3d 354 (2002). Emerald's  
23 broad reading of the federal statute is not supported by the other  
24 statutory or regulatory language. 25 U.S.C. § 483(a) authorizes  
25 individual Indian owners, subject to approval, to execute mortgages or  
26 deeds of trust. 25 C.F.R. § 152.17 refers to sales, exchanges and  
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1 conveyances "by" Indian owners.

2       The ambiguity created by the phrase "with respect to" must be  
3 considered in light of the paternalistic nature of the statutory scheme.  
4 The Congressional intent was not to protect non-Indians who may acquire  
5 interests in trust land but to protect the Indian owners. If the  
6 statute is read as Emerald suggests, non-Indians who hold encumbrances  
7 against trust land would be precluded from transferring their lien  
8 interest without prior approval of the BIA even though that transfer was  
9 from one non-Indian to another. Holders of deeds of trust and mortgages  
10 frequently transfer large batches of mortgages on the secondary mortgage  
11 market to other lenders. Large groups of mortgages are frequently  
12 assigned to servicing agents who service the underlying transaction on  
13 behalf of the holder of the beneficial interest under the Deed of Trust.  
14 *Washington State Dept. of Revenue v. Security Pacific Bank, supra.*  
15 Requiring approval from BIA of any specific mortgage which relates to  
16 trust land would interfere with the secondary mortgage market. Holders  
17 of material or crop liens on trust land could not assign those liens  
18 without BIA approval. Such results were not intended by the statute and  
19 are contrary to its purpose. Nor would it be consistent with the  
20 purpose of the statute to require approval of transfers of beneficial or  
21 other interests in land from non-Indians to Indians. The statutory and  
22 regulatory purpose is the oversight of the transfer of individual Indian  
23 owner's interest in trust land, not the oversight of transfers of non-  
24 Indian third-party interests.

25       The history of this particular Deed of Trust indicates that on  
26 previous occasions, assignment of non-Indians' beneficial interest in  
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1 trust land to other non-Indians have been approved by the BIA. For  
2 example, when BFC, the holder of the beneficial interest under the Deed  
3 of Trust at issue, transferred its beneficial ownership interest to Gold  
4 Eagle and John Soh, the assignment was submitted to BIA for approval.  
5 Emerald argues that this history demonstrates that BIA approval is  
6 required for any transfer of a beneficial interest under a Deed of Trust  
7 encumbering Indian trust land. The court disagrees. A party may in an  
8 excess of caution take additional steps which are not required by law,  
9 but that exercise of prudence does not change the law and render those  
10 additional steps mandatory. The federal statutes and regulations do not  
11 require approval by BIA of the transfer of a non-Indian's beneficial  
12 interest under a Deed of Trust encumbering Indian trust land.

13 **ISSUE 4 - RES JUDICATA EFFECT OF HARGROVE BANKRUPTCY**

14 The Hargrove bankruptcy proceeding in the Western District of  
15 Washington resulted in an order approving the sale of the real property  
16 which is the subject of the Deed of Trust. That sale was contemplated  
17 in the proposed plan. The sale order entered on October 11, 2001 states  
18 that Emerald was concerned that the Bankruptcy Court "make clear that  
19 property subject to the leases of signs by Emerald Outdoor Advertising  
20 LLC be specifically excluded from this order" and the order did so. The  
21 plan was confirmed November 29, 2001 and provides that "Gold  
22 Eagle/Harrison" would be paid from the sale of the property or if the  
23 sale was not successful, "Gold Eagle/Harrison" could foreclose the Deed  
24 of Trust. The plan also provided for the assumption of the Emerald  
25 leases. Ultimately, the sale was not successful and foreclosure  
26 occurred.

1 Harrison argues since the confirmed plan allowed foreclosure, the  
2 Bankruptcy Court must have necessarily determined that Harrison's  
3 interests were superior to Emerald. Alternatively, Harrison argues that  
4 if the confirmed plan did not necessarily determine the issue, since  
5 Emerald could have litigated the issue in the bankruptcy proceeding but  
6 did not, it should now be precluded from doing so.

7 The doctrine of claim preclusion bars the re-litigation of claims  
8 and issues that were litigated or should have been litigated in a prior  
9 action. Broadly stated, claim preclusion is designed to prevent  
10 repetitive litigation of the same matters. It ensures the finality of  
11 decisions. *Pederson v. Potter*, 103 Wash. App. 62, 11 P.3d 833 (2000).  
12 Application of the doctrine requires identity between a prior judgment  
13 and a subsequent action as to (1) persons and parties, (2) cause of  
14 action, (3) subject matter, and (4) the quality of persons for or  
15 against whom the claims are made. *Loveridge v. Fred Meyer, Inc.*, 125  
16 Wash.2d 759, 763, 887 P.2d 898 (1995). The doctrine may be applicable  
17 in determining the effect of confirmed bankruptcy plans. *In re Heritage*  
18 *Hotel Partnership I*, 160 B.R. 374 (B.A.P. 9<sup>th</sup> Cir. 1993).

19 A prerequisite to the application of res judicata is a final  
20 decision on the subject matter. The Bankruptcy Court never addressed  
21 the issue of the competing priority of interests between Emerald and  
22 Harrison. It never addressed the validity or enforceability of the  
23 assignment from Gold Eagle to Harrison as evidenced by the references in  
24 the Bankruptcy Court pleadings "Gold Eagle/Harrison." It could not have  
25 been determining the validity of the foreclosure nor the effect of the  
26 foreclosure on Emerald's rights under the leases as the foreclosure had  
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1 not yet occurred. No final decision or final judgment of the Bankruptcy  
2 Court concerns the subject matter of this dispute, i.e., the priority  
3 between Emerald and Harrison. This is not a situation similar to a  
4 default judgment in which a final determination exists and the issue is  
5 whether that final determination is enforceable against a party which  
6 had an opportunity to litigate the merits of the issue. Here, there is  
7 no final determination of the Bankruptcy Court which could be enforced  
8 against either Emerald or Harrison and claim preclusion is inapplicable.

9 Harrison has cited no authority for the proposition that it is  
10 mandatory that disputes between third-parties regarding the priority of  
11 their interests in estate property be determined in a bankruptcy  
12 reorganization proceeding. Resolution of that dispute was not an  
13 integral component of the Harrison reorganization plan. Harrison's  
14 argument that the failure to raise the dispute in the reorganization  
15 proceeding precludes its later resolution would leave these parties in  
16 a perpetual dispute unable to resolve the issue in this or any forum.

17 Similarity, Harrison argues that the decision of the Puyallup  
18 Tribal Court of Appeals in *Gold Eagle v. Hargrove*, 98-561 (1999)  
19 determined that the Deed of Trust recorded in Pierce County in 1994 had  
20 priority over the Emerald leases recorded in 1995. Harrison asks this  
21 court give full faith and credit to that determination. The issue  
22 before the Tribal Court of Appeals was whether the Tribal Court had  
23 jurisdiction of the dispute between Gold Eagle and Hargrove. The Tribal  
24 Court concluded it did and that in the absence of a tribal scheme, the  
25 lower Tribal Court should apply state foreclosure law. It did not  
26 address the issue of the validity of the later assignment from Gold  
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1 Eagle to Harrison or the effect of the later foreclosure upon the  
2 interests of Emerald. Giving full faith and credit to the Tribal  
3 Court's decision simply does not resolve any of the current issues  
4 before this court.<sup>2</sup>

5 ISSUE 5 - EFFECT OF DEED OF TRUST FORECLOSURE  
6 ON RECORDED LEASE INTEREST

7 Ordinarily, a non-judicial foreclosures pursuant to R.C.W.  
8 61.24.050 extinguishes all junior liens on the same property. In re  
9 *Trustee's Sale of Real Property of Upton*, 102 Wash. App. 220, 224, 6  
10 P.3d 1231 (2000). *Mann v. Household Finance Corp. III*, 109 Wash. App.  
11 387, 393, 35 P.3d 1186, 1188 (2001).

12 A trustee's sale has the effect of depriving 'the grantor or his  
13 successor in interest and all those who hold by, through or under  
14 him of all of their interest in the property.' [Former] RCW  
15 6[1].24.030(6)(i) [1990]. . . . Thus a nonjudicial foreclosure  
eliminates all subordinate liens and other interests in the  
property but has no effect on liens and other interests that are  
prior to the deed of trust.

16 IV WASH. STATE BAR ASS'N, REAL PROPERTY DESKBOOK § 48.10(6)(b)(i), at 48-  
17 33 (3d ed. 1996) as cited in *In re Mann, supra*.

18 Having determined that Harrison's interest under the Deed of Trust  
19 was superior to the interest of Emerald, the foreclosure terminated and  
20 extinguished Emerald's junior interest in the real property.


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23 <sup>2</sup>The Tribal Court did find that the Hargrove Deed of Trust was  
24 "duly entered by the BIA". It is undisputed that the Deed of Trust  
25 was approved by the BIA in 1994 when it was recorded with Pierce  
26 County and that it was recorded with the BIA in 1997. Those  
27 undisputed facts certainly support the Tribal Court's conclusion that  
the Deed of Trust was "duly entered" but the Tribal Court did not  
resolve the legal issues regarding the priority between the Deed of  
Trust and the leases.

1 CONCLUSION

2 The motion of the debtor Emerald to assume the leases is **DENIED** as  
3 those leases were terminated and extinguished by the Harrison  
4 foreclosure action. Harrison's motion to lift stay to proceed in the  
5 Tribal Court is now moot as that action was ultimately removed to this  
6 court and is a pending adversary proceeding.

7 DATED this 31<sup>st</sup> day of October, 2003.

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10 PATRICIA C. WILLIAMS, Bankruptcy Judge  
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CHRONOLOGY OF EVENTS

6/13/94 Deed of Trust Hargrove to BFC recorded with Pierce County  
7/7/94 Puget Sound BIA approve Hargrove Deed of Trust  
1/9/95 First Emerald lease from Hargrove  
1/12/95 - BIA approved first lease  
6/1/95 Second Emerald lease from Hargrove  
6/13/95 - BIA approved second lease  
1995 Both leases recorded with BIA  
1/2/96 BFC assignment to Soh and Gold Eagle  
1/3/96 - Assignment recorded Pierce Co.  
3/3/97 - Assignment approved by BIA  
5/97 Hargrove DOT recorded with BIA Portland  
12/15/97 Soh give ½ interest to Gold Eagle  
3/3/98 - BIA certificate of assignment  
3/9/98 - Assignment recorded with BIA  
3/18/98 - Assignment recorded with Pierce County  
3/98 Gold Eagle starts non-judicial foreclosure against Hargrove  
12/2/98 - Hargrove in Tribal Court sues to stop foreclosure  
9/14/99 - Tribal Court allows foreclosure  
2/8/01 Gold Eagle assigns Deed of Trust to Harrison, no BIA approval  
2/8/01 - Assignment recorded with Pierce County  
2/9/01 Hargrove filed bankruptcy  
11/29/01 Plan confirmed and Harrison allowed to foreclose  
5/31/02 Deed of Trust foreclosure sale  
6/6/02 Trustee Deed of Trust granted Harrison  
6/7/02 - Recorded with BIA and Pierce County